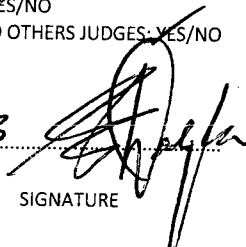


/SG

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DATE: 26/07/13

CASE NO: A404/2010

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
26/7/2013	
DATE	SIGNATURE

In the matter between:

GRAVETT HERBST

APPELLANT

And

T RILEY

RESPONDENT

JUDGMENT

MAKGOBA, J

- [1] This is an appeal against a judgment of the magistrate's court, Lydenburg wherein the trial court gave judgment in favour of the respondent (plaintiff in the court *a quo*) for payment of the sum of R27 360.00 with costs. The respondent had issued summons against the

appellant whom he cited as the first defendant and a close corporation known as SILENT SALESMAN CC as the second defendant.

- [2] The appeal was initially heard on 9 September 2011 before ZONDO and WEBSTER JJ. Our brothers could not agree in their decision and the matter was referred to the full bench for further hearing.
- [3] The respondent's cause of action was founded upon a verbal sale agreement which the respondent had allegedly concluded with the appellant, alternatively with the close corporation and further alternatively the appellant and the close corporation. The appellant denied that he concluded the agreement with the respondent and similarly that he concluded the agreement with the respondent as an employee or agent of the close corporation.
- [4] It is convenient in this matter to set out the allegations as they appear in the summons and particulars of claim:

“

2.

The first defendant is Mr Gravett Herbst an adult businessman of ABC Cash Loans, Kantoor Street, Lydenburg.

3.

The second defendant is Silent Salesman CC with registration number 2003/0804088/23 a close corporation registered in terms of the laws of South Africa trading as Gimme Power and trading at 23 McKenzie Street Florida Park.

4.

During or about April 2008 the first defendant alternatively the second defendant, alternatively the first and second defendants entered into a verbal agreement with the plaintiff on the following terms:

4.1 first defendant alternatively the second defendant, alternatively the first and second defendants will supply the plaintiff with 2X1200 watt invertors.

4.2 that the plaintiff will pay the amount of R27 360.00 for the invertors.

7.

On the 22 April 2008 the Plaintiff paid the amount of R27 360.00 directly into the account of the second defendant on instructions of the first defendant.

8.

The first defendant on behalf of the second defendant took repossession of the equipment on the 7 July 2008 but the first defendant alternatively the second defendant alternatively the first and second defendants refuse to reimburse the Plaintiff in the amount of R27 360.00 being the purchase price the Plaintiff paid.

9.

Therefore the first defendant alternatively the second defendant, alternatively the first and second defendants became liable to the Plaintiff in the amount of R27 360.00."

[5] The summons in the magistrate court was issued and served on both the first and second defendants. The second defendant did not enter appearance to defend. Judgment by default was granted against the second defendant on 19 January 2009. The matter against the first defendant went on trial and on 27 November 2009 the magistrate granted judgment in favour of the plaintiff (the present respondent).

[6] From the evidence adduced at the trial the following facts are common cause:

6.1 The invertors bought by the respondent had latent defects and/or did not comply with the respondent's requirements and the second defendant duly took possession of the invertors on 7 July 2008.

6.2 The invertors were returned to the second defendant, Silent Salesman CC and not to the appellant.

6.3 The purchase price, namely R27 360.00 was paid by the respondent direct into the account of Silent Salesman CC.

6.4 The invertors were delivered to the appellant by one Mr Sol George, a member of Silent Salesman CC.

6.5 At the time of the conclusion of the agreement the appellant was not a producer or supplier of the invertors. The appellant was not a franchisee or franchise holder in respect of the invertors.

6.6 The appellant had no technical knowledge of the workings of an invertor and was not able to work out a quotation taking into account the needs of the respondent.

[7] In the light of the common cause facts and on the probabilities it is highly unlikely that the appellant would conclude an agreement in his own name with the respondent. The facts show that all he did was to bring the client and supplier in a relationship so that the supplier could supply the goods to the client. At best for the respondent, the appellant acted as an agent for an undisclosed principal namely Silent Salesman CC trading as Give Me Power.

- [8] It is clear that the respondent was aware of the existence of the undisclosed principal, namely Silent Salesman CC hence the close corporation was cited as the second defendant. In the circumstances the respondent failed to prove an agreement between himself and the appellant but that the appellant in all probability acted as an agent for an undisclosed principal.
- [9] The appellant contends on appeal, correctly in my view, that the appellant acted for an undisclosed principal whose identity became known to the respondent and that the respondent could not sue the appellant and the second defendant jointly but only in the alternative. That the default judgment granted against the close corporation precludes the respondent from continuing with the action against the appellant.
- [10] It is trite law that the liability of an undisclosed principal and of an agent is an alternative one, they are not liable jointly and severally, each is liable on contract but the right of action is against one or the other and not against both. See *Natal Trading and Milling Company Limited v Inglis* 1925 TPD 724.

[11] In the aforementioned case the head note reads as follows:

“An undisclosed principal and his agent are liable alternatively and not jointly and severally on a contract made by the agent. When the undisclosed principal is discovered the other contracting party may sue either the principal or the agent, and if with the full knowledge of the circumstances he elects to sue either, he is debarred from subsequently proceeding against the other on the same contract.”

[12] The ***Natal Trading and Milling*** case *supra* was followed in the matter of ***Talacchi and Another v The Master and Others*** 1997 1 SA 702 (TPD).

On page 709B-D VORSTER AJ expressed himself as follows:

“On the contrary, in my view that judgment is correct in principle. Once it is accepted that the liability of an undisclosed principal and the agent towards the third party is alternative and not cumulative, one is driven to the inescapable conclusion that once the cause of action against either of the two is exhausted by

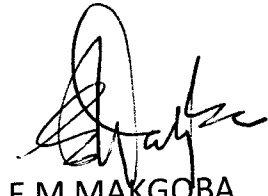
reason of a judgment taken, there can be no room in principle for enforcing that same claim against the other.”

- [13] *In casu* judgment by default was requested by the respondent and granted against the second defendant (Silent Salesman CC) on 19 January 2009. This judgment has not been set aside and still stands.

Accordingly, the respondent was debarred from proceeding against the appellant as the liability of an agent and an undisclosed principal is in the alternative and not jointly or cumulative.

- [14] The appeal is accordingly upheld with costs including the costs occasioned by the hearing of this matter on 9 September 2011. The judgment of the magistrate is set aside and replaced with the following order:

“The plaintiff’s claim is dismissed with costs.”



E M MAKGOBA

JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree



M M JANSEN

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree



S NAIDOO

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

A404/2010/sg

Heard on:

For the Appellant:

Instructed by:

For the Respondent:

Instructed by:

Date of Judgment:

24 July 2013

Adv CFJ Brand

Pieter Nel Attorneys c/o DP Du Plessis Inc

Adv EP Van Rensburg

Jacobs Attorneys c/o Van Zyl Le Roux Inc

26 July 2013